BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM V. SHINN JR. Claimant	)	
VS.	)	
CABLE SPECIALISTS OF TEXAS Respondent	)	Docket No. 264,848
AND	)	
LIBERTY INSURANCE CORP. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of an Award entered on December 27, 2002, by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on June 10, 2003.

APPEARANCES

Randy S. Stalcup of Wichita, Kansas, appeared for the claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the claimant suffered a 62.5 percent work disability based on a 25 percent task loss and a 100 percent wage loss.

The sole issue raised on review by the respondent is the nature and extent of claimant's disability. Respondent notes the treating physician concluded claimant suffered

a scheduled injury to the shoulder but did not suffer a permanent injury to his hip. Consequently, respondent contends claimant has suffered only a scheduled disability. Respondent further argues that, if it is determined claimant is entitled to a work disability, a wage should be imputed to the claimant because he did not make a good faith effort to find appropriate employment.

Claimant requests the ALJ's Award be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

William V. Shinn, Jr., began working full-time for respondent in January 2001 as a cable installer. Claimant's job duties required that he sometimes use a ladder to replace filters that determine which television channels a cable customer receives.

On March 6, 2001, claimant was up on a ladder, which was leaning against an apartment building, and working on some cable boxes. A dog came by and began running around the base of the ladder barking at claimant. A chain hooked to the dog's collar wrapped around the ladder and pulled it from underneath the claimant. The claimant fell approximately 25 feet to the ground and landed on the cement alleyway as well as the ladder. Claimant was on his hands and knees when he hit and experienced pain in his left shoulder and right hip.

On March 8, 2001, claimant went to the hospital and x-rays taken of his right hip and left shoulder were normal. Claimant's arm was placed in a sling and he was provided restrictions against using his left hand. Respondent could not accommodate the restriction.

Dr. Robert L. Eyster was designated the authorized treating physician by the ALJ after a preliminary hearing held on May 15, 2001. Dr. Eyster first examined claimant on May 29, 2001. Claimant complained of pain in his left shoulder and right hip. Physical examination did not reveal any loss of range of motion. X-rays of claimant's left shoulder and right hip were both normal and did not indicate any degenerative changes. The doctor ordered an MRI which also was negative for any findings.

On June 8, 2001, Dr. Eyster injected cortisone into claimant's shoulder and hip. The doctor diagnosed claimant's shoulder with impingement syndrome and mild irritation of the rotator cuff. The doctor diagnosed the hip pain as caused by a bursitis reaction over the greater trochanter area. On July 2, 2001, the doctor again injected claimant's shoulder and referred him for physical therapy. On July 27, 2001, the doctor recommended additional physical therapy for the hip as well as the shoulder and placed claimant on Elavil, an anti-

depressant for night musculoskeletal pain. When the doctor saw claimant again on September 6, 2001, his shoulder was better but his hip was still painful and another injection was given in the hip.

Because claimant continued to complain of hip pain for which Dr. Eyster concluded there were no objective findings, the doctor ordered a bone scan which did not reveal any positive findings in the hip but did show a little arthritic change in the acromioclavicular joint in the shoulder. Based upon the shoulder finding the doctor told claimant a resection of the distal clavicle could be performed in an attempt to alleviate the pain. But claimant declined the proposed surgery for his shoulder because he did not think the success rate for the proposed procedure was high enough to warrant surgery.

On November 13, 2001, the doctor released claimant to return to work without any restrictions. Although claimant continued to complain of left shoulder and right hip pain the doctor concluded claimant was at maximum medical improvement. The doctor rated the hip at 0 percent because of the lack of objective findings. The doctor rated the shoulder at 2 percent because the bone scan was positive and the continuing irritation of the joint. But the doctor agreed he arrived at that percentage based upon his experience and there is no table in the AMA *Guides*[1] to find that particular percentage.

Dr. Eyster testified that during the course of treatment he provided cortisone injections to the shoulder as well as the hip. Physical examinations consistently revealed full range of motion in the hip and shoulder and there was no observed limping or shortened stance phase. Diagnostic studies consisting of x-rays, an MRI and a bone scan were negative for the hip. The bone scan revealed some uptake in the AC joint area of the shoulder. The doctor had provided temporary restrictions while treating claimant but upon release determined claimant did not need any permanent restrictions. Dr. Eyster further testified that he never observed claimant limping or a shortened stance phase, which means moving one leg faster than the other while ambulating. Moreover, Dr. Eyster never observed a positive Faber's test.

Claimant was examined by Dr. Pedro A. Murati on December 10, 2001, at the request of claimant's attorney. Dr. Murati diagnosed left shoulder pain secondary to AC arthrodosis and hip sprain. Dr. Murati did not review the bone scans, x-rays or MRI but did read the other doctor's reports of the results. Dr. Murati's examination of claimant's hip revealed a positive Faber's and an antalgic gait due to a shortened stance phase.

The doctor placed restrictions on the claimant of no lifting greater than 35 pounds, 35 pounds occasionally and 20 pounds frequently, alternate sitting, standing and walking, and use good body mechanics. Based upon the AMA *Guides*, claimant was rated at 5 percent for the left upper extremity based upon the loss of range of motion of the left

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

shoulder which converts to a 3 percent whole person impairment. For the shortened stance phase and positive Faber's exam of the right hip claimant was provided a 7 percent whole person impairment. Using the Combined Values Chart, these impairments combine for a 10 percent whole person impairment.

Claimant complains of continued pain in his shoulder and that his hip is painful if he sits for more than 30 minutes and he can only walk about a half mile before the pain begins to bother him.

After claimant was released from treatment by Dr. Eyster, he sought employment and maintained a list of the employers he contacted for possible work. It should be noted that respondent's business had been sold and it was no longer conducting business in Kansas.

Claimant made 10 job applications on two days in December 2001. After that his job search efforts consisted of mailing resumes every Friday and waiting for a response. The resumes were sent to businesses advertising in the newspaper or businesses selected from the telephone book which had work claimant felt he had experience performing. Claimant did not go to job service. And he did not fill out any applications for any prospective employers after December 2001. Claimant's wife works and claimant is a full-time father taking care of the children aged 12, 11 and 10.

Initially, it must be determined whether claimant suffered a scheduled injury to the left shoulder for which his entitlement to benefits would be pursuant to K.S.A. 44-510d(a)13 or whether he also suffered permanent impairment to the hip for which his entitlement to benefits would be pursuant to K.S.A. 44-510e.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to assess the medical testimony, along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by the medical evidence presented in the case and has a responsibility of making its own determination.[2]

Drs. Eyster and Murati both opined claimant suffered permanent impairment to his left shoulder as a result of his work-related accident. Dr. Eyster concluded claimant had suffered a 2 percent permanent partial functional impairment to the left upper extremity. But Dr. Eyster admitted he did not utilize the AMA *Guides* and relied upon his experience to rate the claimant. Dr. Eyster did not say that the AMA *Guides* did not address the particular shoulder condition that claimant suffered from and that was the reason he deviated from the AMA *Guides*. Dr. Murati concluded claimant had suffered a 5 percent permanent partial functional impairment to the left upper extremity based upon the AMA

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[2] *Tovar v. IBP, Inc.*, 15 Kan App. 2d 782, 817 P.2d 212, *rev denied* 249 Kan. 778 (1991).

Guides. Because functional impairment must be based upon the AMA *Guides*[3], when the impairment is contained therein, the Board adopts Dr. Murati's opinion and determines claimant has a 5 percent permanent partial functional impairment to the left upper extremity.

Although Dr. Eyster concluded claimant had no permanent impairment to his hip, nonetheless, he provided treatment for the hip which included cortisone injections as well as physical therapy. The claimant still had the same complaints of pain when released from treatment by Dr. Eyster. Dr. Murati opined claimant had a 7 percent permanent partial functional impairment to the right hip because of a positive Faber's and an antalgic gait due to a shortened stance phase. The Board is persuaded, in this instance, that Dr. Murati's opinion more appropriately conforms to claimant's continued and consistent complaints of hip pain from the date of the accident. Consequently, the Board determines claimant has a 7 percent permanent partial functional impairment to the right hip.

The left upper extremity rating of 5 percent converts to a 3 percent permanent partial impairment of function to the whole body which combines with the 7 percent for the hip for a 10 percent permanent partial functional impairment to the whole body.

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e (Furse 2000), which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But this statute must be read in light of *Foulk* and *Copeland*.[4] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had

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[3] See K.S.A. 44-510e(a) and K.S.A. 44-510d(a)(23).

[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

Respondent argues claimant failed to make a good faith effort to find employment. Respondent argues that during claimant's job search in December 2001 he filled out 10 employment applications. But after that claimant began only sending out resumes every Friday without making any specific follow up contacts nor ever applying in person at business locations.

Karen Terrill, a rehabilitation consultant, opined that if she had worked with claimant on job placement, his efforts would not constitute good faith. She concluded that simply mailing a resume, without follow-up does not indicate claimant was actively pursuing employment. And the failure to register or check with job service raised further doubts about the claimant's job search efforts. Ms. Terrill further opined claimant retained the ability to earn $400 a week utilizing Dr. Murati's restrictions and $600 a week based upon Dr. Eyster's determination that no permanent restrictions were necessary.

Jerry Hardin, a personnel consultant, opined claimant retained the ability to earn $300 a week based upon Drs. Murati and Eyster's restrictions. When he met with claimant Dr. Eyster had provided temporary restrictions and Mr. Hardin was unaware whether those restrictions were changed. Mr. Hardin had no opinion whether claimant had made a good faith effort to find appropriate employment.

Claimant's job search consisted of mailing resumes every Friday to businesses. He obtained the list of prospective employers either from newspaper want ads or from the telephone book. Claimant would use the telephone book to determine businesses that did the type of work he felt he could perform. He described that as mechanical type work. Although claimant further noted that many of the businesses had been contacted more than once, he never described the nature of the repeat contacts and whether he just sent another resume or a follow up letter.

Where a claimant has the ability to earn wages but is not doing so, an inquiry must be made into the good faith efforts of the claimant in seeking employment. "An effort that amounts to nothing more than a sham or token effort will not suffice."[5] Based upon the totality of the evidence and the vocational expert testimony, the Board concludes claimant

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[5] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

has failed to make a good faith effort to find appropriate employment. Although claimant generated an impressive list, nonetheless, when viewed in the context that claimant selected potential employers and mailed a resume, but did not actively seek employment by going to businesses and filling out applications or utilize the facilities of job service, the conclusion is that claimant was merely making a token effort to find employment. Consequently, it is necessary to impute a wage to claimant.

As previously noted, Karen Terrill opined that claimant had the ability to earn $600 a week in the absence of any restrictions per Dr. Eyster or if Dr. Murati's restrictions were utilized claimant had the ability to earn $400 a week. These would average $500 a week. Conversely, Jerry Hardin opined claimant had the ability to earn $300 a week. The Board concludes there is no reason to discount either vocational expert's opinion and finds claimant retains the ability to earn $400 a week. This finding results in a 20 percent wage loss. When combined with claimant's 25 percent task loss the claimant has a resultant 23 percent work disability.

When claimant initially began his job search, especially in the month of December, he was arguably engaged in a good faith job search because he was visiting potential employers' job sites and filling out employment applications. The claimant would be entitled to a 100 percent wage loss for that month because his wage loss component of the work disability formula would be increased while he was making a good faith effort to find appropriate employment. But due to the relatively short time period he engaged in a good faith effort to find appropriate employment, the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the final amount due. Therefore, this award simply uses the final percentage of work disability to compute the total number of weeks of permanent partial disability compensation.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated December 27, 2002, is modified to award claimant a 23 percent work disability.

The claimant is entitled to 33.43 weeks temporary total disability at the rate of $333.35 per week or $11,143.89 followed by 91.21 weeks permanent partial compensation at the rate of $333.35 per week or $30,404.85 for a 23 percent work disability, making a total award of $41,548.74 which is all due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of September 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director